Definition of Injury in Ohio Workers' Compensation Law: *Bowman v. National Graphics Corp.*

In *Bowman v. National Graphics Corp.*[1] the Ohio Supreme Court held that a physical disability developed gradually over a prolonged period of time in the performance of an employee's normal job duties was not a compensable injury under Ohio workers' compensation law.[2] Section 4123.01(C) of the Ohio Revised Code provides: " 'Injury' includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of and arising out of, the injured employee's employment."[3] The court found that the requirement of "accidental in character and result" was not met by the plaintiff's back injury, which was not caused by a specific identifiable incident but rather was a gradually worsening condition arising from the course of his employment. The plaintiff, therefore, was denied compensation.

This Case Comment will provide background material concerning the development and refinement of the definition of injury in Ohio workers' compensation law. *Bowman* will then be analyzed in light of the legislative history leading to the present statutory definition of injury and the existing case law. This Comment will suggest that a different result, more in keeping with the legislative history, could have been reached without upsetting prior Ohio decisions concerning the definition of injury.

I. Facts and Holding

Joseph L. Bowman began his employment with National Graphics Corporation in 1960. As a part of his normal job duties as a book binder operator, he often lifted bundles of paper weighing 50 to 150 pounds from a skid to a table. In January 1973, Bowman began suffering from a gradually worsening backache that intensified during the last three months of 1973. On January 11, 1974, Bowman informed his employer that he could no longer work because of the backache. He later filed a claim with the Bureau of Workers' Compensation, alleging that he injured his back on January 10, 1974.

Bowman's claim was allowed by a deputy administrator of the Bureau of Workers' Compensation for an injury described as "lumbosacral sprain." That finding was affirmed by the Board of Review. The Industrial Commission refused to hear the employer's appeal.[4]

---

1. 55 Ohio St. 2d 222, 378 N.E.2d 1056 (1978).

2. Throughout this comment, "workmen's compensation" and "workers' compensation" will be used interchangeably. S. 545, 111th Gen. Assembly, 2d Sess. (1976), amended the workmen's compensation statutes and substituted the word "workers' " for "workmen's." This change became effective on January 1, 1977; therefore, all the older cases refer to "workmen's compensation."

3. Ohio Rev. Code Ann. § 4123.01(C) (Page 1973).

4. 55 Ohio St. 2d at 222, 378 N.E.2d at 1057.

The employer appealed to the Court of Common Pleas of Franklin County,[5] which held that Bowman was entitled to participate in the Workers' Compensation Fund.[6] The decision reflected the reasoning of *Stull v. Keller*,[7] which likened the breakdown of the body to the breakdown of mechanical equipment. The court in *Stull* reasoned that human injury resulting from employment is a cost of production, as is mechanical failure, and that "[t]he modern rule [that has] evolved is that costs of production should be borne by the consumer of the goods produced."[8]

National Graphics Corporation then appealed to the Court of Appeals for Franklin County, which affirmed the trial court decision.[9] After discussing the history of the definition of injury in Ohio workers' compensation law and the decisions reached by other states when faced with this question, the court of appeals concluded that the Ohio General Assembly intended to compensate any injury directly caused by employment "regardless of whether it was preceded by any sudden mishap external to the person of the employee."[10]

The employer again appealed and the Supreme Court of Ohio reversed, concluding that a gradually worsening condition does not meet the requirement of section 4123.01(C) of the Ohio Revised Code that the injury be "accidental in character and result."[11] The court relied on the rule enunciated in an earlier decision in which it held that a claimant's condition must be "accidental in its character in the sense of being the result of a sudden mishap occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place."[12] The court stated that Bowman's injury developed gradually and as a result of normal "wear and tear" and, therefore, could not be compensated under the existing state of the law.[13]

A rather lengthy and detailed dissenting opinion, written by Justice Sweeney and joined by two other justices, outlined the legislative and judicial history of the definition of an injury in Ohio workers'

5. The appeal was taken pursuant to OHIO REV. CODE ANN. § 4123.519 (Page 1973) which provides:

> The claimant or the employer may appeal decision of the industrial commmission in any injury case, other than a decision as to the extent of disability, to the court of common pleas of the county in which the injury was inflicted or in which the contract of employment was made if the injury occurred outside the state.

6. Bowman v. National Graphics Corp., No. 75CV-02-801 (C.P. Franklin County Jan. 12, 1977).

7. 11 Ohio Misc. 45, 228 N.E.2d 682 (1967).

8. *Id.* at 52, 228 N.E.2d at 686.

9. Bowman v. National Graphics Corp., No. 77AP-173 (Ct. App. Franklin County Aug. 18, 1977).

10. *Id.* at 10.

11. Bowman v. National Graphics Corp., 55 Ohio St. 2d 222, 224, 378 N.E.2d 1056, 1058 (1978).

12. *Id., citing* Malone v. Industrial Comm'n, 140 Ohio St. 292, 292, 43 N.E.2d 266, 267 (1942) (syl. 1).

13. 55 Ohio St. 2d at 225, 378 N.E.2d at 1058.

compensation law and reasoned that the General Assembly intended that a broader range of injuries be compensable than would be allowed by the majority opinion. After his examination of the history of the statute, Justice Sweeney concluded that "irrespective of whether the physical harm or damage suffered by an employee may have been the result or culmination of a gradual worsening condition caused by the daily performance of his normal or routine job duties, his injury should be compensable where he demonstrates that he is unable to continue his employment as a result of a disabling back injury received in the course of and arising out of his employment."[14]

II. Evolution of the Definition of "Injury" in Ohio Workers' Compensation Law

The concept of a mandatory workers' compensation fund to compensate employees for injuries resulting from their employment was introduced into Ohio law through the Ohio constitution, which provides:

> For the purpose of providing compensation to workmen and their dependents, for death, injuries or occupational disease, occasioned in the course of such workmen's employment, laws may be passed establishing a state fund to be created by compulsory contribution thereto by employers, and administered by the state, determining the terms and conditions upon which payment shall be made therefrom.[15]

In 1913 the General Assembly exercised its constitutional authority and enacted General Code section 1465-68, which provided in pertinent part:

> Every employe . . . who is injured, and the dependents of such as are killed in the course of employment, wheresoever such injury has occurred, provided the same was not purposely self-inflicted, . . . shall be entitled to receive . . . such compensation for loss sustained on account of such injury or death.[16]

The language of the provision seems to encompass any injury that occurs in the course of the injured worker's employment.

The notion that an injury must result from an accident or a specific occurrence began in the courts, not the legislature. As early as 1923, the Ohio Supreme Court, in *Renkel v. Industrial Commission*,[17] concluded that although neither the constitutional amendment nor the statute mentioned the word "accident," a distinction needed to be made between an occupational disease and a compensable injury.[18] In that case, compensation was denied to a worker who had contracted tuberculosis as a result of inhaling iron dust over a period of years. The court reasoned

14. 55 Ohio St. 2d at 236, 378 N.E.2d at 1064 (Sweeney, J., dissenting).

15. Ohio Const. art. II, § 35.

16. 103 Ohio Laws 79 (1913).

17. 109 Ohio St. 152, 141 N.E. 834 (1923).

18. Ohio Rev. Code Ann. § 4123.68 (Page 1973 & Supp. 1978) contains a detailed list of occupational diseases that are presently compensable under Ohio Law.

that the word "injury" does not encompass "disease," and "compensation may be awarded for incapacity by reason of disease only where it is shown that the disease was caused by or is the result or consequence of a compensable injury."[19]

The court struggled with the injury/disease dichotomy for several years. One of the earliest attempts to clarify the demarcation point was in *Industrial Commission v. Roth*.[20] In that case, the court approved an award of compensation to the family of a painter whose death had resulted from a prolonged exposure to ultraviolet light eventually leading to building. An accident was defined as "some happening that occurs by chance, unexpectedly, and not in the usual course of events. It is something that might possibly be prevented by the exercise of due care and caution."[21] Other decisions rested on narrow applications of the definition of injury; thus, the court distinguished such events as "a specific emission of fumes"[22] from a prolonged exposure to ultraviolet light eventually leading to blindness,[23] and compensated the former but not the latter.

This series of cases in which the court was attempting to distinguish a compensable injury from a noncompensable occupational disease eventually led to the decision in *Industrial Commission v. Franken*.[24] The worker in that case became ill while performing his normal job duties. After going home, he suffered heart failure and died twenty-five days later. The court denied recovery because no "accident" had occurred and stated that "the term 'injury' as used in the Ohio Workmen's Compensation Law comprehends only such injuries as are accidental in their origin and cause."[25] The court then concluded that if the construction of the workers' compensation statutes was contrary to legislative intent, the expansion of the scope of cases compensable under General Code section 1465-68 "should be done by unambiguous legislative enactment."[26]

In 1937 the General Assembly heeded the *Franken* court's suggestion and amended General Code section 1465-68 to provide as follows: "The term 'injury' as used in this section and in the workmen's compensation act shall include any injury received in the course of, and arising out of, the injured employee's employment."[27] One of the earliest and most important decisions construing this definition of injury was the 1942 case of *Malone v. Industrial Commission*.[28] That case concerned an employee who died as a result of the heat prostration that he suffered due to his employment in a

19. 109 Ohio St. at 156, 141 N.E. at 836.
20. 98 Ohio St. 34, 120 N.E. 172 (1918).
21. *Id.* at 40, 120 N.E. at 174.
22. Industrial Comm'n v. Polcen, 121 Ohio St. 377, 381, 169 N.E. 305, 306 (1929).
23. Industrial Comm'n v. Russell, 111 Ohio St. 692, 146 N.E. 305 (1924).
24. 126 Ohio St. 299, 185 N.E. 199 (1933).
25. *Id.* at 302, 185 N.E. at 200.
26. *Id.*
27. 117 OHIO LAWS 109 (1937).
28. 140 Ohio St. 292, 43 N.E.2d 266 (1942). *See* text accompanying note 12 *supra*.

foundry. The court briefly discussed the history of workers' compensation in Ohio and recognized that the requirement that the injury be accidental and traumatic had been used by the court "to distinguish an injury by accident from an injury through disease."[29] The court also concluded that prior judicial interpretation of the statutory language "arose out of the employment" referred to the requisite causal connection between the worker's injury and his employment.

In *Malone* the court set out the following definition of injury distilled from earlier cases decided under the unamended statute: "The term 'injury,' as used in the Constitution and the Workmen's Compensation Act shall comprehend a physical or traumatic injury, accidental in its origin and cause; the result of a sudden happening occurring by chance, unexpectedly, and not in the usual course of events, at a particular time."[30] The court left this definition unchanged in deciding *Malone*, although it recognized that the General Assembly intended to effect a change in the law to the extent of the change in language. Thus, the court retained the requirement of a sudden mishap.

Although the injury in *Malone* would not have been compensable under the *Franken* holding because there was "no evidence whatever of any extraordinary or unusual happening in and about [his] work preceding his illness,"[31] the *Malone* court granted compensation to Malone's widow, stating:

> Heat exhaustion, suddenly and unexpectedly suffered by an employee as a result of the circumstances and requirements of his employment subjecting him to a greater hazard than that to which members of the general public are subjected . . . constitutes an accidental traumatic injury under the Workmen's Compensation Act of this state.[32]

The decision indicated that the accidental injury requirement could be satisfied if the injury was "accidental in character and result," which was interpreted to mean that "something unforeseen, unexpected, and unusual occurs which produces the injury or from which the injury results."[33]

The 1944 decision of *Maynard v. B.F. Goodrich Co.*[34] reiterated the requirement of an accident and emphasized the causal connection needed to establish a compensable injury. In the course of his normal job duties Maynard and a fellow worker were required to lift a roll of fabric weighing between 500 and 600 pounds, which was unlike any roll that he and his coworker had previously handled. As a result he suffered a hip injury and eventually died. The *Maynard* court held that the court of common pleas

---

29. *Id.* at 295, 43 N.E.2d at 269.
30. *Id.* at 297, 43 N.E.2d at 269.
31. Industrial Comm'n v. Franken, 126 Ohio St. 299, 300, 185 N.E. 199, 200 (1933).
32. Malone v. Industrial Comm'n, 140 Ohio St. 292, 293, 43 N.E.2d 266, 268 (1942) (syl. 4).
33. *Id.*, 43 N.E.2d at 267 (syl. 2).
34. 144 Ohio St. 22, 56 N.E.2d 195 (1944).

had erred by entering judgment for the defendant as a matter of law. The court said:

> The statute does not expressly require the injury to be accidental. Neither is it expressly required therein that there be a causal connection between the injury and the employment. Yet there is the express provision that the injury must be received in the course of and arise out of the employment. This essential cannot exist without such causal connection and, in turn, causal connection cannot exist unless the injury is accidental in character and result.
>
> The evidence in the case at bar warrants an inference that there was an injury within the meaning of the statute and that such injury was received in the course of and arose out of the employment.[35]

The decisions continued in this more expansive vein until the latter portion of the 1950s. At that time two important and restrictive decisions were issued by the Ohio Supreme Court—*Dripps v. Industrial Commission*[36] and *Davis v. Goodyear Tire and Rubber Co.*[37] In *Dripps* the worker injured his shoulder while performing the same work that he had been performing for several weeks. The court denied compensation by limiting a compensable injury to one "preceded by some sudden mishap, external in character, resulting in the disability."[38] In his concurring opinion, Judge Taft pointed out that the requirement of accidental *means* is inconsistent with the "accidental in character and result" language of *Malone*[39] and *Maynard*[40] and to that extent, in his opinion, those cases were overruled by *Dripps*. Judge Hart concurred both in the judgment and with the court's requirement of extra effort or greater strain than usual as a minimum for a compensable injury. He interpreted the 1937 amendment, however, as no longer requiring accidental means. Finally, Judge Zimmerman dissented, briefly stating that the majority opinion seemed to return to the court's pre-1937 position. He also expressed the opinion that the purpose of the 1937 amendment was to "broaden the term, 'injury,' to embrace injuries accidental in character and result as well as those produced or caused by accidental means."[41]

In *Davis*, the worker injured his back while pushing on a tire that had stuck to the drum. It seems that this was a normal occurrence in his occupation, and the majority denied compensation, reaffirming its position in *Dripps* that extra effort alone is not enough and that accidental means must precipitate the injury. In a concurring opinion, Judge Bell, who had joined in Judge Taft's concurrence in *Dripps*, emphasized that the court in *Dripps* had chosen one of two irreconcilable paths by requiring

35. *Id.* at 31, 56 N.E.2d at 199.
36. 165 Ohio St. 407, 135 N.E.2d 873 (1956).
37. 168 Ohio St. 482, 155 N.E.2d 889 (1959).
38. 165 Ohio St. at 409, 135 N.E.2d at 875.
39. 140 Ohio St. 292, 43 N.E.2d 266 (1942).
40. 144 Ohio St. 22, 56 N.E.2d 195 (1944).
41. 165 Ohio St. at 412, 135 N.E.2d at 877.

accidental means for a compensable injury. He further stated that the court should, for the sake of consistency, maintain that position and that, if the *Dripps* approach were wrong, the error should be corrected by the General Assembly.

Judge Taft's dissenting opinion in *Davis* delineated the issue as whether the employee must suffer an injury as a result of accidental means or whether one may be compensated if the injury represents an accidental result. Finally, Judge Taft translated the statement in *Malone* that "the *Malone* and *Maynard*, on the one hand, permitted compensation if the injury was an accidental result; on the other hand, *Dripps* and its companion case, *Artis v. Goodyear Tire and Rubber Co.*,[42] required accidental means. Judge Taft discussed the events leading to the 1937 amendment and concluded that the legislature intended to reject *Franken*,[43] which required accidental means, and to approve *Spicer Manufacturing Co. v. Tucker*,[44] which indicated that an injury might be compensable if it is an accidental result even though not preceded by accidental means. He then proceeded to the *Malone* case, interpreting the court's syllabus as requiring *either* an accidental cause *or* an accidental result. Finally, Judge Taft translated the statement in *malone* that "the term 'injury' . . . comprehends a physical or traumatic damage"[45] that is caused by an accident to mean that such an injury is included in the class of compensable injuries but not to the exclusion of all other injuries. He closed his dissent by stating that "the ordinary meaning of the language used by the General Assembly in the above-quoted 1937 statutory amendment . . . requires the conclusion that an injury may be an injury within the meaning of the Workmen's Compensation Act if accidental in result though not caused by accidental means."[46]

Later in 1959, the General Assembly responded with the passage of another statutory amendment. The definition of injury reads in its present form: " 'Injury' includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment."[47] The second important action taken by the legislature in 1959 was the placement of a liberal construction statute in chapter 4123 of the Ohio Revised Code: "Sections 4123.01 to 4123.94, inclusive, of the Revised Code shall be liberally construed in favor of employees and the dependents of deceased employees."[48]

---

42. 165 Ohio St. 412, 135 N.E.2d 877 (1956).

43. 126 Ohio St. 299, 185 N.E. 199 (1933).

44. 127 Ohio St. 421, 188 N.E.2d 870 (1934).

45. 140 Ohio St. at 292, 43 N.E.2d at 267.

46. 168 Ohio St. at 494, 155 N.E.2d at 896.

47. OHIO REV. CODE ANN. § 4123.01(C) (Page 1973). *See generally* A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 42.00, 42.10, 42.11 (1979).

48. OHIO REV. CODE ANN. § 4123.95 (Page 1973).

In 1962 the court interpreted the new statutory language in *Hearing v. Wylie*.[49] The majority ruled that the General Assembly had intended to adopt the definition of injury as set out by the majority in *Malone* and Judge Zimmerman's dissent in *Dripps*. The court held, however, that the plaintiff could not recover because the statute had no retroactive effect.

The case of *Swanton v. Stringer*[50] is one of the most recent cases construing the definition of injury. In that case, the injured employee, a metal polisher, was performing his normal job duties when he turned on his machine and a cloud of dust flew out. Swanton, who suffered from a lung condition, was unable to return to his employment following the occurrence. The court noted that the cloud of dust was "unforeseen, unexpected and unusual in character";[51] thus, the requirements of *Malone* were met and compensation was granted. The court then dealt with the issue of proximate causation. The holding of the court is best summarized in the syllabus:

> A disabling condition, resulting from a pre-existing disease and claimed to have been accelerated by an injury in the course of and arising out of employment, is compensable under the Workmen's Compensation Act, where it is established that such disability was accelerated by a substantial period of time as a direct and proximate result of such injury.[52]

It is against this backdrop that *Bowman v. National Graphics Corp.* must be analyzed and understood.

III. CRITIQUE

In denying compensation for Bowman's back condition, which had developed gradually over a prolonged period as the result of his performance of his normal job duties, the Ohio Supreme Court relied on its holding in *Malone* that a claimant's condition, in order to be compensable, must be "accidental in its character in the sense of being the result of a sudden mishap occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place."[53] In other words, a majority of the court required that the plaintiff adduce evidence of an identifiable incident—an accident—which led to his condition, a burden Bowman failed to meet.

A. *The Majority Opinion*

1. *Prior Judicial Interpretation of "Accidental"*

The court signalled its rejection of the plaintiff's contention that a

49. 173 Ohio St. 221, 180 N.E.2d 921 (1962).
50. 42 Ohio St. 2d 356, 328 N.E.2d 794 (1975).
51. *Id.* at 359, 328 N.E.2d at 798.
52. *Id.* at 356, 328 N.E.2d at 796.
53. 140 Ohio St. at 292, 43 N.E.2d at 267 (syl. 1).

condition that had gradually developed as a result of the performance of his job duties was a compensable injury with this bald statement: "This court has never held a claim such as appellee's to be an 'injury' as defined in the statute."[54] A close examination of the factual situation resulting in a compensable injury in *Malone*, however, reveals striking similarities to that in *Bowman*. The employee in *Malone* worked in a foundry and was constantly exposed to extremely high temperatures in his work area. Bowman worked as a book binder operator and was constantly required to lift heavy bundles. One day Malone succumbed to heat prostration and later died from that condition in combination with acute indigestion. Bowman worked one day and was unable to work the next due to severe back pain.[55] Although Bowman's disability admittedly resulted from a gradually worsening condition, while the heat prostration could have resulted from one day's exposure to the high temperatures, the facts are not clearly distinguishable.

The court in *Bowman* stated that the claimant's condition was the result of normal wear and tear, which implies that a person who lifts heavy bundles can expect to develop a back condition; however, the increased likelihood that a worker will suffer a particular type of injury does not automatically preclude compensation under the statute. A person who works in a superheated atmosphere is more likely to suffer heat prostration than the average worker. The court allowed compensation in *Malone* because "[w]hile the decedent in this case voluntarily worked in a superheated atmosphere, his death was not the usual and expected result but the unusual and unexpected result of such employment, and was, therefore, accidental."[56] The same analysis may be applied in *Bowman*. Bowman also voluntarily lifted heavy bundles as a normal part of his job duties and suffered a back injury, which was "not the usual and expected result but the unusual and unexpected result of such employment, and was, therefore, accidental."

Clearly, the chance of suffering from a back injury is greater if someone engages in constant lifting than if that person engages in a more sedentary type of occupation; it does not follow, however, from this recognition of probability that a back injury is the "usual and expected result." Such evidence was not referred to in the case, but it is highly likely that many people can and do engage in this type of employment activity without resulting residual back conditions. The point is, of course, that Bowman's back injury meets the definition of "accidental" as stated in *Malone*.

The *Bowman* court stated further: "Under the stated facts of this cause it is clear that we cannot affirm the holding of the court below except by reversing our holding in *Malone*. . . . Clearly, under the facts of the

54. 55 Ohio St. 2d at 224, 378 N.E.2d at 1058.

55. *See* Brief for Defendant at 1-5.

56. 140 Ohio St. at 301, 43 N.E.2d at 271.

instant case there was no *occurrence* which was unforeseen, unexpected, and unusual which produced Bowman's disability."[57] What the *Bowman* court thought was so clear is not at all apparent from the facts and the holding in *Malone*. In that case there was no unforeseen or unexpected *occurrence* that produced his death. Malone went to work and was performing his normal duties in their normal superheated atmosphere when he became ill.[58] The only aspect of the situation that was unforeseen and unexpected was his reaction on that particular day. The same observation can be made about Bowman's condition. Admittedly there was no unforeseen or unexpected *occurrence*, but there was an unforeseen result. And that unforeseen result satisfies the definition of "accidental" set out by the *Malone* decision. It is therefore evident that the court could have allowed compensation in *Bowman* without overruling *Malone*.

Although the majority in *Bowman* read the *Malone* decision as providing a restrictive definition of injury, two important aspects of that opinion lend weight to a contrary result. First, the *Malone* decision was actually a broader reading of the definition of injury than had previously been used because it added the "accidental in character or result" language. As was discussed in the prior section,[59] before the *Malone* decision the Ohio Supreme Court had required that there be an accidental *means* resulting in an injury before compensation would be granted. *Malone* was the first case in which an accidental *result* was found to be compensable in the absence of an accidental means. Thus, that decision cannot realistically be interpreted as restricting the scope of the definition of injury.

Second, the court granted the compensation sought in *Malone*. It is not the normal rule of case analysis to use a case that has offered a broadened construction of a statute to stand for the proposition that the statute should be narrowly construed. In this instance, it is incongruous to say that *Malone*, which granted compensation for a condition that would previously have been noncompensable, should require a more restrictive reading of the statute in *Bowman*. Thus, *Malone* is not persuasive for the proposition that the definition of injury should be construed as narrowly as the *Bowman* majority has mandated.

2. *Statutory Construction*

The most significant and far-reaching implications of the *Bowman* decision lie in the court's construction of the workers' compensation statute and the statute's definition of injury.[60] As was outlined in the background of the present statute,[61] the situation at the time of the 1959

57. 55 Ohio St. 2d at 225, 378 N.E.2d at 1058 (emphasis added).

58. 140 Ohio St. at 292, 43 N.E.2d at 266.

59. *See* text accompanying notes 27-33 *supra*; Alloway, *Malone Revisited—Definition of Injury under the Ohio Workmen's Compensation Act*, 17 CLEV.-MAR. L. REV. 75 (1968).

60. *See* text accompanying note 3 *supra*.

61. *See* text accompanying notes 15-46 *supra*.

amendment was one of two conflicting lines of cases construing the definition of injury. The *Malone-Maynard*[62] line allowed compensation for injuries "accidental in character and result." *Malone* also required a specific identifiable incident. *Maynard* emphasized the requisite causal relationship between the employee's employment and the resulting injury. The *Dripps-Davis*[63] rule required an external accidental means. The decisions in *Dripps* and *Davis* were issued in 1956 and 1959, respectively. The legislature then amended the definition of injury in 1959.

The *Bowman* court relied heavily on the fact that the General Assembly rejected the following proposed definition offered in House Bill 470:

> Injury shall mean any disability or harmful bodily change, traumatic or otherwise in origin or result, received in the course of, and arising out of the injured employee's employment. It shall include the occurrence or aggravation of any disability through the use of any exertion or being subject to any strain. To constitute any injury it shall not be necessary that there be some sudden, unusual unexpected occurrence, or sudden specific mishap or event, or accidental means.[64]

The last sentence of the proposed definition is the negative of the language of the *Malone* syllabus.[65] The General Assembly instead added the parenthetical phrase "whether caused by external accidental means or accidental in character and result." The statute reads in its present form: " 'Injury' includes any injury, whether caused by external accidental means or accidental in character and result, received in the course of, and arising out of, the injured employee's employment."[66] The court seemed to be saying that, since the General Assembly took this approach, the intent of the legislature was to adopt *Malone* as a whole, including the requirement of a specific identifiable incident set out in paragraph one of the syllabus.[67] It is not persuasive to say, however, that when the General Assembly rejected the proposed definition—which included the statement "[t]o constitute an injury it shall not be necessary that there be some sudden, unusual unexpected occurrence, or sudden specific mishap"[68]—it intended to voice its approval of a definition requiring a specific incident in order that an injury might be compensable.

In *Hearing v. Wylie*,[69] the first case construing the 1959 amendment, the court concluded that " 'injury' . . . includes a physical or traumatic damage or harm accidental in character and result and a physical or

62. *See* text accompanying notes 28-35 *supra*.
63. *See* text accompanying notes 36-46 *supra*.
64. H.R. 470, 103d Gen. Assembly, 1st Sess. (1959).
65. *See* text accompanying note 12 *supra*.
66. OHIO REV. CODE ANN. § 4123.01(C) (Page 1973).
67. 140 Ohio St. 292, 43 N.E.2d at 267.
68. *See* text accompanying note 64 *supra*.
69. 173 Ohio St. 220, 180 N.E.2d 921 (1962).

traumatic damage or harm produced or caused by accidental means."[70] The *Hearing* majority reasoned that the new statutory language "accidental in character and result" was an expression of the General Assembly's intention to define injury in terms of the *Malone* rule[71] and Judge Zimmerman's dissent in *Dripps*,[72] both of which utilized that phrase. The court also found that the amendment created a right to compensation that was previously nonexistent and, therefore, denied compensation to Hearing because his injury, a ruptured appendix that resulted from lifting a side of beef in the normal course of his employment, occurred prior to the 1959 amendment.

Judge Zimmerman dissented in *Hearing* and stated that he was convinced that the legislature had *originally* intended to compensate "*any injury* received by a workman which was directly attributable to and associated with the employment in which he was engaged at the time . . . and embraced an injury accidental in character and result as well as one caused by accidental means."[73] He went on to state that he believed that when the General Assembly amended the definition of injury in 1959, "it did no more than to restate and emphasize what it had actually intended and said when it amended Section 1465-68, General Code, in 1937 and when it included similar language in original Section 4123.01, Revised Code, defining 'injury.' "[74] Therefore, his disagreement with the majority related only to the effective date of the statutory change.

Judge Zimmerman's interpretation of the 1959 amendment is a viable, and perhaps more appropriate, approach to the construction of the statute. There is little doubt, however, that even if the *Bowman* court's decision had been consistent with the *Hearing* majority's interpretation that the 1959 amendment broadened the scope of compensable injuries, the court could have properly granted compensation to Bowman.

B. *The Dissenting Opinion*

Justice Sweeney, in his dissenting opinion,[75] thoroughly explored the legislative history of the definition of injury and came to a different conclusion than the majority. He noted that "[t]he requirement that an injury be 'accidental' to warrant compensation came into being in a series of early Ohio cases wherein this court distinguished between injuries and occupational diseases."[76] This distinction was drawn, the dissent argued, because it was believed that occupational diseases were a special area of

70. *Id.* at 221, 180 N.E.2d at 921 (syl. 1).
71. 140 Ohio St. at 293, 43 N.E.2d at 267 (syl. 2).
72. 165 Ohio St. at 411, 135 N.E.2d at 876.
73. 173 Ohio St. at 225, 180 N.E.2d at 924 (emphasis in original).
74. *Id.* at 225-26, 180 N.E.2d at 924.
75. 55 Ohio St. 2d 222, 226, 378 N.E.2d 1056, 1059.
76. *Id.* at 228, 378 N.E.2d at 1060.

concern for the General Assembly since there had been no recovery for them at common law.

Justice Sweeney believed that the 1933 decision in *Franken*,[77] which required an accidental occurrence before compensation would be granted and which requested legislative guidance in the interpretation of "injury," was at least a partial impetus to the 1937 passage of a statutory definition of "injury,"[78] which he translated as eliminating the "accidental occurrence" requirement. Justice Sweeney expressed his opinion that *Malone*[79] and *Maynard*,[80] decisions that followed the 1937 amendment, did not do away with the "accidental injury" requirement, but merely "broadened the scope of the requirement to include injuries which are 'accidental in character and result.'"[81] He then read *Dripps*[82] and *Davis*[83] as reinstating the "accidental means" requirement. Finally, in 1959, the year of the *Davis* decision, the General Assembly amended the definition of injury "[a]s if in response to Judge Bell's concurring opinion in *Davis*,"[84] which voiced a request to the legislature "to correct any error the court may have made in applying the *Dripps* test for determining the existence of a compensable injury under the Act."[85]

Justice Sweeney thought it significant that, in addition to the new definitional language, the legislature introduced a liberal construction statute[86] to the statutory scheme. That statute provides that the workers' compensation statutes should be liberally construed in favor of employees and their dependents.

From this legislative and judicial history, Justice Sweeney concluded:

> As can be observed from a review of the legislative history of R. C. 4123.01(C), the General Assembly's response to the prior holdings of this court defining the parameters of a compensable injury has consistently been that of including within the definition those disabilities which this court had ruled as non-compensable in its prior pronouncements. Thus, the statutory definition of "injury" as it reads presently is open-ended. The phrase "whether caused by external accidental means or accidental in character and result" cannot be interpreted as setting forth an additional condition precedent for compensation for an injury. Rather, when read in light of the legislative history of the section, it is apparent that the present definition merely restates the 1937 definition that *any* injury received in the course of, and arising out of, the injured employee's employment is compensable irrespective of whether such injuries come under the *Dripps* or *Malone* rule.[87]

77. *See* text accompanying notes 24-26 *supra*.
78. *See* text accompanying note 27 *supra*.
79. *See* text accompanying notes 28-33 *supra*.
80. *See* text accompanying notes 34-35 *supra*.
81. 55 Ohio St. 2d at 230, 378 N.E.2d at 1061.
82. *See* text accompanying notes 36-41 *supra*.
83. *See* text accompanying notes 37-46 *supra*.
84. 55 Ohio St. 2d at 232, 378 N.E.2d at 1062.
85. *Id.*
86. *See* text accompanying note 48 *supra*.
87. 55 Ohio St. 2d at 233, 378 N.E.2d at 1062-63 (Sweeney, J., dissenting) (emphasis in original).

He pointed out that the majority insisted that the General Assembly's compromise definition, using the "accidental in character and result" language, evidenced an intent to codify the *Malone* test; however, the majority seemed to ignore the fact that the definition also includes the *Dripps* "external accidental means" language. Justice Sweeney then suggested that since these tests are mutually exclusive, "they clearly can only constitute examples of situations in which injuries are compensable."[88]

The dissenting opinion in *Bowman* appears on close analysis to be the more appropriate construction of the present definition of injury. The General Assembly's response in adding the language "whether caused by external accidental means or accidental in character and result" seems to be a broadening of the definition as construed by the court; however, it need not be the adoption of the first paragraph of the *Malone* syllabus, which required a sudden mishap.[89] If it were, why did the legislature choose to adopt the more inclusive language of the second paragraph instead?[90] The most obvious response is that the General Assembly saw the court's interpretations of injury at that time to be unduly limiting and narrow. In an attempt to expand the coverage of the statute, the General Assembly chose language in the alternative—external accidental means *or* accidental in character and result—thereby incorporating requirements of both lines of cases in existence at the time of the amendment. This choice was undoubtedly consistent with the legislature's intent to widen the scope of the statute beyond that permitted by the court's continued restrictive construction.

The dissent's interpretation is also more consistent with the ordinary meaning of an accidental injury. The term "accidental injury" has been defined as an "injury occurring as the unforeseen and chance result of a voluntary act."[91] Bowman's injury fits nicely with this definition: his back injury was the unforeseen result of his voluntary act of lifting the heavy bundles while performing his job duties. The dissent's construction of the definitional section would also fall within the parameters of this definition. The well-known rule of statutory construction is that one interprets the words of a statute in terms of their normal usage unless the statute clearly indicates otherwise. In this case, the statute does not direct one to a new or

88. *Id.* at 234, 378 N.E.2d at 1063.

89. 140 Ohio St. at 292, 43 N.E.2d at 267. The first syllabus of *Malone* provides:

> The term "injury" as used in the Constitution and in Section 1465-68, General Code . . . comprehends a physical or traumatic damage or harm, accidental in its character in the sense of being the result of a sudden mishap occurring by chance, unexpectedly and not in the usual course of events, at a particular time and place.

140 Ohio St. at 292, 43 N.E.2d at 267.

90. The second syllabus of *Malone* provides: "When, in connection with an intentional act on the part of a workman which precedes an injury to him, something unforeseen, unexpected, and unusual occurs which produces the injury or from which the injury results, it is accidental in character and result." 140 Ohio St. at 293, 43 N.E.2d at 267.

91. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 11 (1970).

different meaning of the word injury, and the close interplay of the narrow court decisions followed by broadly worded statutory amendments is persuasive that the legislature did indeed intend that the ordinary meaning of injury be applied.

Another argument that lends credence to to this broader interpretation is the absurd result that would occur if the majority's reasoning is closely followed. One of the best examples of such a result is reflected in the distinction, noted by Justice Sweeney in his dissenting opinion, that would be made between two employees suffering from gradually worsening back conditions.[92] One lifts an unusually heavy load normally not required in his job, and the other is merely unable to continue lifting at his job. Although both injuries would be employment-related, only the first would be compensable. This contravenes the policy set out by the court in *Fassig v. State ex rel. Turner*,[93] one of the earliest workers' compensation cases to reach the Ohio Supreme Court, in a discussion of the purposes of the constitutional amendment providing for a compulsory state fund:

> It came to be believed that employees should receive compensation for injuries received in the course of their employment, without reference to questions of negligence, unless the injury was caused by their own wilful act; that as a matter of justice, based upon scientific considerations, injuries to workmen in the course of their employment, which were not caused by their own wilful act, should be regarded as a charge upon the business in which they were engaged.[94]

Undoubtedly both injuries in the above example arose in the course of employment and, therefore, both should be chargeable against the employer as a cost of doing business. The suddenness of the injury should have no effect on that determination. If one carries this distinction to its logical end, a person who is permanently and totally disabled by a gradual condition related to his work will probably have to rely on some sort of public assistance or social security disability program in order to subsist. This result spreads the cost of such a condition among all taxpayers as opposed to the consumers of a particular industry's product, as would seem to be the intent of the workers' compensation statutes as determined by the *Fassig* court.

A final factor militating strongly in favor of the dissent's reading of the definition of injury is the liberal construction statute[95] that was first enacted in 1959, the same year that the present definition of injury was passed. It provides for liberal construction of the workers' compensation statutes in favor of the employee. This clearly indicates an intent on the part of the General Assembly to open channels for compensation of claims in addition to those that had previously been allowed by the court.

---

92. 55 Ohio St. 2d at 235, 378 N.E.2d at 1063.

93. 95 Ohio St. 232, 116 N.E. 104 (1917).

94. *Id.* at 236-37, 116 N.E. at 105.

95. *See* text accompanying note 48 *supra*.

In light of the legislative history of the 1959 amendment, the rationale behind the workers' compensation statutes in general, the absurd results which would follow if one accepts the majority's interpretation, and the 1959 liberal construction statute, a better reading of the statute is one that would include as a compensable injury a gradually worsening condition if the employee is able to establish that it arose out of and in the course of his employment.

C. *Policy Considerations and Practical Implications*

There are significant policy considerations and practical implications of this decision that were discussed only briefly, if at all, by the *Bowman* court. Two of the most important policy considerations with regard to broadening the scope of the definition of compensable injury are the cost involved in compensating a larger class of injured employees and the likelihood of fraudulent claims. The almost unavoidable increase in cost is, of course, of great concern to the Industrial Commission and to Ohio's employers. The Commission is responsible for collecting and administering the State Insurance Fund.[96] One aspect of that job is to assign a risk factor to an industry and to assess that industry accordingly.[97] If a cumulative injury were compensable, there would need to be some reevaluation of various industries and new and higher risk factors assigned. This, in turn, would affect the various employers who would be required to contribute additional amounts to the state fund, since participation is required by law.[98] Finally, the consumers of such affected industries would see the new rates reflected in higher prices.

In response to such concerns, one can only say that such a policy decision is clearly within the powers given to the General Assembly by the state constitution.[99] Furthermore, it appears that the General Assembly, through its many attempts to broaden "injury" beyond the narrow scope given it by the court, has made that policy decision. And, lastly, the rationale of the workers' compensation program is that the consumers of an industry bear the cost of that industry, including the cost of physical injury to its employees.[100] How better can this result obtain than by charging the industry for *all* injuries caused thereby, including cumulative

96. OHIO REV. CODE ANN. § 4123.32 (Page 1973 & Supp. 1978): "The industrial commission shall adopt rules and regulations with respect to the collection, maintenance, and disbursements of the state insurance fund."

97. OHIO REV. CODE ANN. § 4123.29 (Page 1973 & Supp. 1978): "The industrial commission shall classify occupations or industries with respect to their degree of hazard, and determine the risks of the different classes and fix the rates of premium of the risks of the same."

98. OHIO REV. CODE ANN. § 4123.35 (Page 1973 & Supp. 1978): "Except as provided in this section, every employer mentioned in division (B)(2) of section 4123.01 of the Revised Code, and every publicly owned utility shall semianually . . . pay into the state insurance fund the amount of premium fixed by the industrial commission." (The exception is for self-insured employers for whom there are special provisions.)

99. *See* text accompanying note 15 *supra.*

100. *See* text accompanying notes 93-94 *supra.*

injuries such as the one dealt with in *Bowman*? As the dissent in *Bowman* cogently argued: "Whether an employee suffers a sudden injury, or is simply injured over a gradual period of time, should be immaterial in determining the cost to the employer of conducting his business."[101]

If the employee is injured seriously enough, he will necessarily seek medical attention. This medical attention will be paid for in one of several ways. If the injury is found to be compensable, the State Insurance Fund will pay the medical bills; if the injury is a gradually worsening condition developed over a prolonged period of time, however, the injured worker will be required to seek another source of funds for that purpose. The employee may have health insurance that will cover this type of condition. If so, the consumers of health insurance will help bear the cost. If the employee does not have such coverage, he may be forced to bear the cost personally. And if he does not have the personal means available to him, he may be forced to seek public assistance, the cost of which is borne by the taxpayers. The question then becomes one of who shall bear the cost—the consumers of the employment-related industry, the consumers of health insurance, the injured employee himself, or the taxpayers? It would appear that the consumers of the industry are the parties best suited to bear the cost and, therefore, the cost should be allocated to them. The *Bowman* majority, however, would preclude this allocation in the case of a gradually developing condition.

The problem of fraudulent claims was addressed briefly by the dissenting justice in *Bowman*. Justice Sweeney urged that the majority opinion would encourage workers to " 'remember' that at a particular time and place they received a back injury while lifting an unusually heavy item normally not required by their job duties."[102] It follows, of course, that an honest employee who does not "remember" would be penalized. The argument can also be advanced that to broaden the scope of compensable injuries would tend to make the State Insurance Fund an all-purpose health insurance fund. This argument, however, ignores the fact that in order to be compensable the injury must be "received in the course of, and arising out of, the injured employee's employment."[103] The determination of the scope of injury should not be based on the vague possibility that fraud might be perpetrated in the future. These issues can best be dealt with as matters of proof—evidence that there was a specific incident by means of witnesses or affidavits or evidence of the requisite causal connection through expert medical testimony. In other words, the decision whether to compensate an employee who has received a cumulative injury should not turn on the likelihood of future fraud by other persons, at least until there is clear evidence that such an abuse has occurred or has been attempted. Instead, the determination should be based upon the more equitable

101. 55 Ohio St. 2d at 235, 378 N.E.2d at 1063.

102. *Id.*

103. *See* text accompanying note 3 *supra.*

considerations of who is best able to bear the cost and the relationship between the injury and the injured employee's employment.

The most important practical implication of the *Bowman* decision is the fact that an employee who has undeniably been injured "in the course of, and arising out of," his employment will not be compensated if he was unfortunate enough to suffer this injury over a period of time while performing the normal duties required of him in his job rather than suffering the *same* injury at "a particular time and place."[104] This result seems to contravene the very purpose for which the State Insurance Fund was established, that is, to compensate employees injured as a result of their employment.

Another absurd result would be the compensability of the injury if, for example, Bowman had dropped the bundle on his toe out of clumsiness or carelessness instead of carefully lifting the bundles as required by his job duties. Since the purpose of the workers' compensation statutes is to provide protection to workers whose injuries result from their employment and to charge the cost of such injuries to the benefited employer, it seems unreasonable to believe that the General Assembly intended that the lifting injury, which would more clearly be a real cost of doing business, be noncompensable. This concept is well-stated by Judge Putnam in *Stull v. Keller*:[105]

> [A]rtificial rules based not upon causation but someone's subjective appraisal of the entertainment value of the surrounding circumstances are no more than remnants of "judge-made" policy which subsidized industry at the expense of the workman in 19th Century England.
>
> This governmental policy is dead!
>
> The modern rule evolved is that costs of production should be borne by the consumer of the goods produced.[106]

Surely the statute should be construed so as to avoid absurd results and contravention of the very purpose for its existence.

If one accepts the view of the majority that a gradual "injury" is merely normal wear and tear on the body, then requiring an employer to provide insurance against this type of injury might be considered harsh because it requires an employer to pay for a second health insurance plan over and above another that most employers at least subsidize. If one accepts the premise that Bowman's injury actually resulted from his employment, however, then the imposition is not as great as it appears. First, as was mentioned earlier, this can be considered a cost of production to be passed on to the consumers, and, second, the workers' compensation statutes protect the employer as well as the employee. The Ohio constitution provides:

---

104. *See* notes 89-90 and accompanying text *supra*.

105. 11 Ohio Misc. 45, 228 N.E.2d 682 (1967). *See* text accompanying notes 7-8 *supra*.

106. 11 Ohio Misc. at 52, 228 N.E.2d at 686.

> Such compensation shall be in lieu of all other rights to compensation, or damages, for such death, injuries, or occupational disease, and any employer who pays the premium or compensation provided by law . . . shall not be liable to respond in damages at common law or by statute for such death, injuries or occupational disease.[107]

Therefore, the employee has surrendered his employment-related causes of action against his employer in exchange for compensation from the State Insurance Fund, and the employer has in turn transferred his personal liability to the state by participating in the fund. Thus, it would seem that an employee in Bowman's position is effectively left without a remedy: he cannot be compensated by the Bureau of Workers' Compensation and he cannot pursue his employer individually.[108] This seems to be an unjust solution to the problem. Surely it would be more equitable to compensate the employee whose injury is truly work-related than to force him to go elsewhere—private insurance or public assistance—for relief.

Another factor to be considered in light of the constitutional provision is its broad sweep with regard to substituting the right to participate in the fund for the right to sue. Part of the concern was undoubtedly the difficulty that employees had in overcoming their employers' defenses of contributory negligence and assumption of risk. Another concern was probably the number of suits that arose from the growth of industrialization. In view of these additional considerations, one must ask whether the General Assembly would draft provisions that would so greatly enhance the protection of employers at the expense of the employees' rights and whether these provisions can be so inequitably interpreted.

Furthermore, although there is no recovery for occupational disease

---

107. OHIO CONST. art. II, § 35.

108. OHIO REV. CODE ANN. § 4123.74 (Page 1973) provides:

> Employers who comply with section 4123.35 of the Revised Code shall not be liable to respond in damages at common law or by statute for any injury, or occupational disease, *or bodily conditon*, received or contracted by any employee in the course of or arising out of his employment . . . (emphasis added).

There is no doubt concerning the intended meaning of the italicized language. It was added to the statute less than two months after the Ohio Supreme Court held that "[t]he right of action of an employee for the negligence of his employer directly resulting in a non-compensable occupational disease has not been taken away by Section 35, Article II of the Constitution of Ohio, or by Section 1465-70, General Code." Triff v. National Bronze and Aluminum Foundry Co., 135 Ohio St. 191, 191, 20 N.E.2d 232, 232 (1939) (syl. 2). The statutory change was enacted as an emergency measure to "allay doubts as to rights and remedies and preserve industrial peace and progress in this state" and was necessitated by a construction of the workmen's compensation statutes by the supreme court "as to disturb relations between employers and employes and to create a basis for litigation contrary to the Ohio workmen's compensation plan." 118 OHIO LAWS 427 (1939).

Recent decisions indicate that there may be a dual recovery by an employee if the employer occupies a second capacity with regard to the employee that invokes other obligations. *See* Guy v. Arthur H. Thomas Co., 55 Ohio St. 2d 183, 378 N.E.2d 488 (1978) (employee occupied role of injured employee and patient of employer hospital); Mercer v. Uniroyal, 49 Ohio App. 2d 279, 361 N.E.2d 492 (1976) (employee occupied positions as injured employee and injured user of product manufactured by employer). These situations, however, are unusual and would not apply to an employee such as Bowman.

at common law, the constitutional provision[109] and the workers' compensation statutes specifically provide compensation for certain occupational diseases.[110] A disability of the type suffered by Bowman is not on that list and, since he was denied compensation under the injury provisions, he is left in a sort of no-man's land: he is precluded from an injury recovery by this decision, he does not qualify for an occupational disease award, and the constitutional provision cuts off any tort remedy he might otherwise have. The General Assembly did not intend to carve out this narrow category of injury to be left uncompensated.

While there are no precise or definitive answers to the questions and issues raised in this section, it is submitted strongly that the equities weigh in favor of compensating Bowman and others like him.

IV. CONCLUSION

The Ohio Supreme Court has unnecessarily narrowed the scope of injuries that are compensable under the workers' compensation laws of this state. It would seem from close analysis of the history of judicial narrowing and legislative broadening of the definition of injury that the General Assembly intended that a cumulative injury, like the one presented in *Bowman*, be compensable so long as it arose out of and in the course of the injured worker's employment. Considerations of policy also favor a broader construction of the definition of injury. In light of the *Bowman* decision and the past history of the definition of injury in Ohio, it will probably be necessary that the General Assembly speak again[111] and less ambiguously if it truly intends to broaden the meaning of injury for purposes of the workers' compensation statutes.

Rachel E. Geiersbach

---

109. OHIO CONST. art. II, § 35.

110. *See* note 18 *supra.*

111. In *Peavy v. Flowers*, 58 Ohio St. 2d 407, 390 N.E.2d 832 (1979), the court, in an opinion that consisted of three short paragraphs, reaffirmed its position in *Bowman*. Therefore, it is clear that legislative action will be necessary to effect a change in the application of the workers' compensation statutes.